

1 as were set by the hearing designation order.

2 When the notice of appearance -- when this case
3 commenced by the notice of appearance, and the hearing
4 process really commenced with the notice of appearance,
5 because without the notice of appearance we know how the
6 case would have been resolved

7 In any event it is represented to me that
8 Southwestern desires to initiate negotiations and enter into
9 a consent order. And then when we had this conference back
10 on June 6th, both sides were telling me that this was a very
11 viable route, and everybody was telling me, in the context
12 of getting some kind of help in moving the application
13 process along.

14 And it was based on those representations that I
15 set these dates down. Now, Mr. Bernard is saying that he
16 has had the blocks kicked out from under him, and I think he
17 is entitled to certainly express those views. And I haven't
18 heard anything from the Bureau except telling me that, well,
19 we have changed our mind; or we were wrong then, and we're
20 right now.

21 And I don't know. I am not -- you know, I have
22 not seen the policy in writing. I haven't seen a written
23 exposition of this. It's just a question of -- as far as I
24 can see, and as far as the record goes, on June 6th you said
25 one thing, and today you are saying something else.

1 And if it is a policy matter, there is really
2 nothing that I can do about it. I cannot tell them to
3 change the policy. If that is their interpretation of the
4 policy, as far as I am concerned, that's it. I mean, I
5 certainly would like to see that. I would like see a
6 written explanation of this so that I can understand what it
7 is that the Bureau is standing on.

8 And how you can be that rigidly constrained to
9 process an application in the context that it has been set
10 for a hearing. When the Commission's policy for consent and
11 settlements is renown, and you have a way that this case
12 could be settled and you can get a station on the air, and
13 you won't have to worry about revisiting the situation
14 again, or precedent, or anything like that.

15 Because under the Telecommunications Act, nobody
16 is ever going to get a chance after February 9th as we know
17 the interpretation. I'm going to ask the Bureau to go back
18 and rethink it. But I can't order you to change it.

19 As I said before, if you want to move these dates
20 up earlier, I will do everything in my power to get out a
21 decision before July 26th.

22 MR. BERNARD: July 26th is your last day, Your
23 Honor?

24 JUDGE SIPPEL: Well, let me be sure that I'm
25 right. July 26th is my last day, and the best I can do on

1 July 26th would be in the morning to sign an order. My last
2 full working day for all practical purposes is July 25th.

3 Now, why don't we go off the record and I want to
4 ask counsel to talk this over in terms of dates, and you
5 tell me what you want to do. I also want a written
6 presentation from the Bureau, in terms of a memorandum, a
7 informational memorandum.

8 I want something down in writing that analyzes
9 this policy, and points out to me exactly what happened -- I
10 don't mean to say who was talking about what, but what I ma
11 saying is why is the Bureau being so rigid in its
12 interpretation of this policy that prompted it to change
13 from June 6th to today in a way that has really put the
14 applicant at a procedural -- at a significant procedural
15 disadvantage.

16 And let me just also say before I close the record
17 down here for the time being, that what holds this whole
18 process up as I'm seeing it, and as I am laying this out,
19 what holds it up in that context is the fact that we've got
20 this date in February that nobody is responsible for.

21 That is an act of Congress, and if that is going
22 to be the last day that anything can be done, then so be it.
23 But it seems to me that having had that unforeseen Act
24 thrust upon the case, that the parties would want to do
25 everything within its power to try and work within those

1 confines.

2 And this is where the difficulty comes in. I'm
3 going to come back by 20 minutes after 10:00, which is about
4 eight minutes from now. What I am asking for again is a
5 date, and procedures for how both parties feel comfortable
6 in proceeding from now on. We're off the record.

7 (Brief recess.)

8 JUDGE SIPPEL: I'm going to paraphrase what
9 transpired off the record in an effort to just time and move
10 this along. But essentially what I have heard from the
11 Bureau off the record is that they don't see any way that
12 Southwestern can succeed on the merits of this case, and it
13 all ties in with the circumstance being that an
14 application -- in order for Mr. Bernard's client to succeed,
15 it would require the Bureau to process a post-designation
16 filing.

17 And which under the policy the Bureau contends
18 that they simply cannot do. And the combination of that
19 circumstance, plus the adoption or the passage rather of
20 the Telecommunications Act of 1996, which gives a cutoff
21 date of February 9th, between those two developments in this
22 case, there is no way from the Bureau's standpoint as we sit
23 here today that they can succeed on behalf of your client.

24 That's point number one. Point number two is that
25 I have pointed out, and it is a matter of record, and it is

1 a matter of taking judicial notice of the fact that the
2 designation order sets this case down for a hearing. And
3 the rules of practice apply once the case gets set down for
4 a hearing.

5 One of the remedies under the Rules of Practice is
6 that a party can file a motion for summary decision within -
7 - at any time before 20 days prior to the hearing, and we
8 certainly qualify for that. And the burden of proof, and
9 the burden of going forward has been assigned by the
10 Commission to Southwestern.

11 Therefore, Southwestern has the opportunity to
12 file a motion for summary decision, which you have that you
13 intend to do. You indicated also off the record that you
14 have every expectation of filing it by the close of business
15 on July 3rd. And under Section 1.251 of the Rules of
16 Summary Decision, the Bureau then would have a period of
17 time to respond, which if you get it on the 3rd, would be
18 the 17th of July.

19 And I will do everything within my powers, and
20 within my control over my time, to have a decision out by
21 the 25th of July. And I see no reason why I can't do that
22 under that time schedule. It would ease the situation
23 considerably for every day earlier than the 17th that the
24 Bureau can get a filing in.

25 In the meantime, I am urging the Bureau to

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1 continue to reconsider, or to consider its position with
2 respect to a consent order as we had talked about on June
3 6th. I'm not suggesting that the Bureau has acted in bad
4 faith. I am not suggesting that at all.

5 I am simply saying that if there is any avenue
6 that can be pursued, in terms of the Bureau's discretion to
7 process this application, which could result in a consent
8 order and getting this case resolved as the Commission wants
9 these -- not this particular case perhaps, but as a case in
10 general the Commission wants its broadcast cases to be
11 settled, and in general the Commission wants licenses to be
12 granted, and broadcasting be put on the air as expeditiously
13 as possible.

14 So, to the extent that that is a counter-policy, I
15 ask the Bureau to consider that policy against this other
16 policy that they have articulated, and see if there is a way
17 that this case can be resolved without having to go through
18 all the hearing process.

19 But right now, of course this case is in the
20 hearing process, and we will be governed by that fact.
21 Lastly, I want to receive from the Bureau a memorandum on
22 this policy, and which explains specifically the facts of
23 this case, in terms of the ultimate facts.

24 That is, the fact that there has been a post-
25 application filing, and what it pertains to. In other

1 words, let me put it another way. A memorandum explaining
2 this policy in the context of the hearing designation order
3 in this case.

4 And any explanation that you can give as to why
5 your position has changed from June 6th until today. Again,
6 I don't require the details of the conferences. You have
7 had your conferences, and those are protected and all.

8 But I want to know the thinking of the Bureau on
9 this, and I want the authority that is, the regulations,
10 the public announcements, the rule making, or whatever it is
11 that you are relying upon, to come out to this, and to what
12 I call a very hard conclusion

13 Now, can you have that in to me by Friday, July
14 5th?

15 MR. SCHEIBEL: Certainly, Your Honor. Will this
16 be something that you will anticipate comments on this, or
17 is this just advisory to the Court?

18 JUDGE SIPPEL: It's a memorandum advising the
19 Court of this policy. Of course, if Mr. Bernard wants to
20 file something, he can file something. I mean, that's --
21 whatever you want to call it, a comment or whatever he wants
22 to do, he certainly can address it.

23 And the reason that I am making this requirement -
24 - and I am setting this requirement down for two reasons.
25 First of all, so that I can fully understand what has

1 happened. I think I have a right to have an explanation.

2 And, secondly, I think that the record should be
3 very clear, because I am expecting that this record is going
4 to go up on appeal. And I think that the briefs, and the
5 reasoning, and all, can be done a lot better if the record
6 is clear right from this point on, in terms of exactly why
7 this case has gotten into this posture.

8 So, those are the two reasons why I am requiring
9 that. You can have it to me by the close of business on
10 Friday, July 5, with a copy hand-delivered to, or at least a
11 copy faxed to Mr. Bernard.

12 MR. SCHEIBEL: Yes, Your Honor.

13 MR. BERNARD: I've been having a problem getting
14 materials in this case, Your Honor. The only thing that I
15 have really gotten is the faxes that your office has been
16 sending me. I'll go check with the dockets branch on that,
17 but I haven't even been getting stuff that you all have been
18 preparing.

19 JUDGE SIPPEL: Well, it's important that these
20 dates be honored, because obviously we are all on a short
21 turnaround time. So, I am saying that the Bureau has until
22 the end of business on July 5th to get that filed with the
23 Commission, and to have a copy delivered to my office, and
24 to get a copy faxed to Mr. Bernard.

25 In fact, why don't I -- I am going to change that

1 to 4:00 p.m., 4:00 p.m. on Friday, July 5th, the Bureau's
2 memorandum. I am just going to refer to it here as the
3 Bureau's memorandum. You can give it a more descriptive
4 heading if you care to. But the record is clear on what it
5 is that I want and why I am requiring it.

6 That's it. Now, the other thing that I will leave
7 open to Mr. Bernard, or to the Bureau Counsel for that
8 matter, but if there is a need as Mr., Scheibel perceived a
9 need, but if there is a need to have another conference on
10 an expedited basis, I am free to do that.

11 So, by all means call and I will be glad to meet
12 on this. But I think, and I feel confident based on what I
13 know now that this is as much as I can do.

14 MR. BERNARD: Yes, Your Honor. I very much
15 appreciate you trying to accommodate us to your obviously
16 important schedule, and I will get the papers in as quickly
17 as I can, and I appreciate your efforts to get something out
18 before you leave. It will help us a lot.

19 JUDGE SIPPEL: All right. Well, that's it then.
20 And I again urge -- I will just leave by saying that I again
21 ask the Bureau to do what it can within reason to get your
22 comment or opposition papers in before the 17th if that is a
23 doable thing. That's it.

24 MR. SCHEIBEL: We will make every attempt, Your
25 Honor.

1 JUDGE SIPPEL: Thank you, Mr. Scheibel. That's it
2 then. We are in recess until the next call. Thank you.

3 (Whereupon, at 10:36 a.m., the hearing was
4 concluded.)

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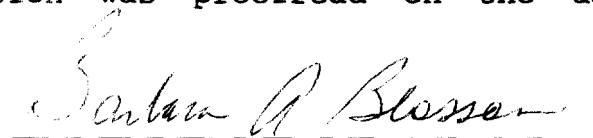
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